No. 77-968

In the Supreme Court of the United States

OCTOBER TERM, 1977

DETROIT EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-12a) is reported at 560 F. 2d 722. The decision and order of the National Labor Relations Board (Pet. 14a-59a) are reported at 218 NLRB 1024.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977, and petitions for rehearing and rehearing *en banc* were denied on November 22, 1977 (Pet. 2; Pet App. 13a). The petition for a writ of certiorari was filed on January 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board exceeded its remedial authority by ordering the Company to furnish to the Union, directly rather than indirectly through a Union hired psychologist, copies of tests and test results relevant to the processing of employee grievances.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) is set forth at Pet. 3.

STATEMENT

Since April 1971, petitioner has been party to collective bargaining agreements with the certified representative of its Monroe power plant employees, Local 223 of the Utility Workers Union of America, AFL-CIO (herein "the Union") (Pet. App. 19a-20a). In late 1971, petitioner began the process of filling six bargaining unit positions (known as "instrument man jobs"). The collective agreement required that notice of such vacancies be posted and that first consideration be given to present unit employees. Among the qualifications for the vacant positions was the achievement of a minimum score on a number of tests selected by petitioner (Pet. App. 20a).[1] Ten unit employees bid for the instrument man slots and took petitioner's tests. All were rejected for failure to achieve the minimum score set by petitioner (Pet. App. 20a). In January 1972, the Union filed a grievance protesting the rejections of the unit applicants, asserting

[1]The tests were selected by petitioner's Industrial Psychology Division on the basis of two studies which indicated a positive correlation between test scores and the performance of incumbent instrument men (Pet. App. 22a-24a).

that the tests were unfair and that petitioner's established minimum score (10.3) was not a "reasonable qualification," as required by the collective agreement (Pet. App. 21a).[2] In order to process the grievance, the Union requested that petitioner supply it with copies of the tests, the applicants' test papers, and their scores. Petitioner refused. (Pet. App. 30a-31a.)

The grievance was rejected by petitioner at all levels, and reached arbitration. The Union asked the arbitrator to order production of the requested materials, but the arbitrator declined on the ground that he did not believe he had the authority to do so (Pet. App. 31a-32a, 34a). The Union and petitioner agreed to proceed with the arbitration without the materials, subject to the right of the Union to reopen the case of petitioner were subsequently ordered by a court to provide them (Pet. App. 67a-68a). The arbitrator issued his decision in December 1973, upholding the use of the tests, but finding that petitioner had set the cutoff score too high (Pet. App. 38a-39a). As a result of the arbitration decision, three of the applicants were reconsidered, but only one was promoted to an instrument man job (Pet. App. 39a).

Upon a charge filed by the Union, a complaint was issued against petitioner, alleging that it had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to provide the requested information (Pet. App. 18a-19a). Following a hearing, the Board's Administrative Law Judge

[2]The agreement included a provision that, "whenever reasonable qualifications and abilities of [applicants being considered for a job] are not significantly different," unit seniority would govern the selection (Pet. App. 26a-27a).

sustained the allegations of the complaint (Pet. App. 54a), and recommended that petitioner be ordered (Pet. App. 55a-56a)

> to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf * * *. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, * * * all copies of the battery of tests shall be returned to [the Company].[3]

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[3]The Administrative Judge stated that he was recommending that the materials be supplied not directly to the Union, but to a psychologist hired by it, because

> mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. * * * [I]n some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form [in] which the information is submitted. [Pet. App. 54a.]

The Administrative Judge also recommended that the actual scores of each applicant on the test battery be provided directly to the Union (Pet. App. 56a).

Petitioner excepted to the latter recommendation, but not to the former. It specifically requested the Board "to adopt that part of the order which requires that tests be turned over to a qualified psychologist selected by the Union," including the provision that such submission be done in accord with the limitations spelled out by the Judge (A. 43-44).[4]

The Board adopted the Judge's findings and recommendations, except that it "would not condition the Union's access to the information on the retention of a psychologist but rather would have [the Company] submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required" (Pet. App. 15a).[5] The Board recognized the interest in maintaining security of the tests and therefore, "in order to preserve their future utility, impose[d] the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (Pet. App. 16a).

A divided court of appeals[6] enforced the Board's order, noting that petitioner "did not except to the [Administrative Law Judge's] finding that it had engaged in an

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[4]"A." refers to the Appendix in the court of appeals.

[5]Member Kennedy would have adopted the Administrative Judge's recommended order (Pet. App. 17a).

[6]Judge Weick, dissenting (Pet. App. 8a-12a) suggested that turning over the test papers to the Union was unnecessary, and would destroy the future value of the tests, would breach the confidential privilege of the applicants, and would subject the examiner to disciplinary action. We address these objections below.

unfair labor practice by refusing the union's request for the test materials" (Pet. App. 2a), and did not contest "the finding that the tests, answer sheets and scores are relevant" (Pet. App. 5a). The court rejected petitioner's contention that the Board erred in ordering that the battery of tests be provided directly to the Union, concluding that the "answer to [petitioner's] concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union. The restrictions on use of the materials and obligation to return them to [the Company] are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board." (Pet. App. 6a-7a.)

The court also rejected petitioner's contention that it would be a breach of confidentiality to give the Union test scores linked to the names of employees taking the test because the "requirement that the bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure" (Pet. App. 7a). Finally, the court rejected petitioner's contention that direct disclosure of the test battery and the linked test scores "would involve [the Company's] industrial psychologists in a breach of their professional ethical code." The "professional code of the American Psychological Association can[not] stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the [American] Psychological Association by adopting the limitations on use of the material recommended by the administrative law judge." (Pet. App. 8a.)

ARGUMENT

Petitioner recognizes that *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, holds that it is a violation of the duty to bargain imposed by Section 8(a)(5) of the Act for an employer to deny the bargaining representative relevant information for use under a contractually-established grievance procedure (Pet. 14). And it does not appear to challenge the Administrative Law Judge's finding, adopted by the Board, that the test materials requested by the Union were "relevant and reasonably necessary to the processing of employee grievances" (Pet. App. 55a), within the purview of *Acme*.[7] Indeed, following the decision of the Administrative Judge, petitioner stated that it had no objection to turning over the materials, subject to the restrictions imposed by

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[7]Petitioner's question presented (Pet. 2) states that "the employer gave or offered to give the Union sufficient information to determine the validity of the tests, and the arbitrator * * * found that production of the actual test battery was irrelevant to the arbitration proceeding and award." Petitioner does not argue this point in the body of the petition. In any event, the Administrative Judge found that, while the statistics offered by petitioner may "tend to show that the tests are valid to serve *the employer's purpose:* i.e., they may serve to identify those employees likely to do well on the job," they

> do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not coextensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut [the Company's] contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion. [Pet. App. 47a; emphasis in original.]

Moreover, while the arbitrator ruled that he had no authority to compel production of the material sought by the Union, he reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order (*supra*, p. 3).

the Judge, to a Union hired psychologist who could show them to the Union (Pet. 6; Pet. App. 55a-56a). Accordingly, the only issue presented on this record is whether the Board exceeded its remedial authority by ordering petitioner to furnish the relevant test materials to the Union, directly, rather than indirectly through a Union hired psychologist. In our submission, the Board's order is a reasonable exercise of its remedial authority; there is no conflict among the circuits;[8] and, accordingly, the case does not warrant review by this Court.

1. Petitioner's contention that the Board's order poses "insuperable barriers to the continuation of * * * extensive testing programs" (Pet. 10) rests on the assumption that "a requirement to turn over the test battery to unions representing employees will naturally lead to foreknowledge of the actual test items by all or a part of the employees who are to take the tests in the future" (*ibid.*). In other words, petitioner does not challenge the adequacy of the restrictions imposed by the Board on the Union's use of the test materials,[9] but

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[8]The Second Circuit's decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, is clearly distinguishable. In *Kirkland*, the court reversed a district court ruling ordering that a new examination replacing the old, discriminatory test be submitted to the plaintiffs for review, where the plaintiffs themselves would subsequently be taking the new test; the case was remanded to the district judge with instructions to take "steps * * * to insure confidentiality." *Id.* at 427. In the instant case, on the other hand, the order did not require the tests to be submitted to potential test-takers, and indeed made provisions to insure that such people did not have access to the tests.

[9]As noted *supra*, p. 4, the Board's order includes the requirement that the Union "not * * * copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of

assumes that the Union will violate the terms of the order. However, as this Court has stated, "[w]e cannot assume that a union conducts its operations in violation of law." *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 67[illegible]0 Cf. *Whalen* v. *Roe*, 429 U.S. 589, 601-602; *DuPont* v. *Finklea*, S.D. W.Va., Civ. Action No. 77-2059-CH, decided December 20, 1977.

Moreover, the court of appeals provided that:

> The restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board. [Pet. App. 7a.]

Thus, violation of the restrictions would subject the Union to contempt proceedings,[11] just as would any other flouting of a court order.

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the contents of the tests. After the conclusion of the arbitration proceeding * * * all copies of the battery of tests shall be returned to [the Company]."

The Administrative Judge, whose order petitioner asked the Board to adopt, based his recommendation that the test battery be turned over to a Union hired psychologist, not on "security" grounds, but on his view that the Union would need professional assistance (see note 3, *supra*). The Board decided to leave to the Union the decision whether it needed a psychologist to aid it in analyzing and interpreting the test materials (Pet. App. 15a). Since the services of a professional psychologist are costly, the Board was reasonable in not requiring the Union to incur this expense unless it believed it was necessary for the intelligent processing of the grievance.

[10]Just as the Company's industrial psychologists have reasons rooted in professional integrity not to improperly disclose or use the tests, so has the Union. The Union's future ability to obtain such data to pursue its representation function would obviously be jeopardized by improper disclosure.

[11]The Union was a party to the Board proceeding (Pet. App. 14a, 18a). By accepting the materials from petitioner under the provisions of the order limiting use of the materials, the Union would be

2. Similarly, there is no merit in the contention of petitioner and *amici curiae* Chamber of Commerce of the United States ("Chamber") and American Psychological Association ("APA") that the Board order enforced by the court below jeopardizes the use of aptitude tests under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.* (Pet. 10-13; APA Br. 15-16; Chamber Br. 7-11). This contention is premised on the assumption, shown to be unfounded (*supra*, pp. 8-9), that the Union will necessarily disclose the materials to potential test-takers, in violation of the limitations on use embodied in the Board's order and the decree of the court below.

Moreover, contrary to petitioner's and APA's contention, the Board's order does not contravene the APA "Standards for Educational and Psychological Tests." Standard 15 (Pet. [illegible]) states that there is a "responsibility for maintaining test security." As we have said, there is no basis for assuming that this responsibility would be

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submitting itself to the jurisdiction of the court of appeals and its order. Moreover, one need not be a party to a case to be subject to contempt for violation of a court's order. Where a person "is not a party and has not been served with a copy of the order, [he may be found in contempt if] * * * he had knowledge of the order * * * and with that knowledge committed a wilful violation of the order." *Walker* v. *City of Birmingham*, 181 So. 2d 493, 504, 279 Ala. 53, 64, affirmed, 388 U.S. 307, 312 n. 4; *United States* v. *Shipp*, 203 U.S. 563, 575; *United States* v. *Hall*, 472 F. 2d 261, 265-267 (C.A. 5).

The cases relied upon by *amicus* Chamber of Commerce of the United States (Chamber Br. 13) for its assertion that the Union could not be found in contempt of the instant order are distinguishable. In those cases the courts indicated that the contempt remedy could not be invoked against nonparties who "act independently [of the parties] and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 437. Here, on the other hand, the Union's rights were adjudged by the court below, and it is subject to the court's order.

breached by turning the tests over under the restrictions of the Board's order. Standard J2 (Pet. 12) states that test scores should "ordinarily be reported only to people who are qualified to interpret them" and that, if reported, the scores "should be accompanied by explanations." The "Comment" to J2 recognizes that it is an "unanswered" question whether untrained people should be given test scores, or only interpretations, and also notes that there is no definitive answer as to who within an organization should have access to scores, except that "curious peers" should not. The Union, as the duly certified representative of the employees, is certainly not a "curious peer" in processing under the collective agreement properly filed grievances.

3. Finally, there is no merit in the contention of petitioner (Pet. 13 n. 2) and APA (APA Br. 9-11) that APA's Code of Ethics, and state law (which incorporates the Code of Ethics), would be breached by compliance with the Board's order to provide the Union with the test scores of the applicants.[12] It is highly speculative that the Code of Ethics would in fact be breached by the Board's order. Two examples of breach cited by APA—the

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[12]APA also contends (Br. 12-13) that the Board's order violates privacy interests of the employees. No employee has raised any such objection. And, as this Court pointed out in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767, in rejecting an employer's contention that disclosure of employees' names and addresses to unions conducting organizing campaigns would violate their privacy interests and subject them to harassment: "The disclosure requirement furthers [the objectives of the Act] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." And see *Whalen* v. *Roe*, *supra*, 429 U.S. at 602.

obligation to safeguard information about clients and the need "to protect examinees * * * from ridicule or harassment by their peers as a result of disclosure" (APA Br. 9)—are premised on APA's contention that the Board's order "disregards the interests of the employees in keeping their scores from becoming common knowledge among their fellow workers" (*ibid.*). Again, this merely takes issue with the judgment of the court below that the safeguards against improper dissemination in the Board's order and its enforcement decree are sufficient to prevent the scores from "becoming common knowledge." The third example rests on the unsupported assumption that a professional association will discipline a member who repudiates an assurance of confidentiality under order of a federal court. But, even if compliance with the federal law were to result in a breach of the APA's Code of Ethics and thereby state law, state law must, of course, give way to the paramount federal law. See *Nash* v. *Florida Industrial Commission,* 389 U.S. 235.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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